Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

JAMES KLINGER and BARBARA J. McCLAIN, on behalf of themselves and all others similarly situated,
Petitioners

v.

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE ARMY, and THE DEFENSE LOGISTICS AGENCY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Has a Federal employee, who has a claim for back pay, exhausted his administrative remedies, where his written claim submitted to his agency fails to plead the legal theory on which he relied for payment in the District Court action?

LIST OF PARTIES

The parties to the proceedings below were Petitioners James Klinger and Barbara J. McClain, on behalf of themselves and all others similarly situated and Respondent United States, the Department of the Army and the Defense Logistics Agency.

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IN THE
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JAMES KLINGER and BARBARA J. McCLAIN, on behalf of themselves and all others similarly situated,
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v.

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE ARMY, and THE DEFENSE LOGISTICS AGENCY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, James Klinger and Barbara J. McClain, on behalf of themselves and all others similarly situated, respectfully pray that a Writ of Certiorari issue to review the Judgment and Memorandum Opinion of the United States Court of Appeals for the Third Circuit entered in the above entitled proceeding on December 20, 1995. On February 8, 1996 said

Court of Appeals denied Petitioners' request for a rehearing.

OPINIONS BELOW

The Judgment and Memorandum Opinion of the Court of Appeals for the Third Circuit, dated December 20, 1995 has not been reported. It is reproduced in Appendix "A' hereto.

The Order of the Court of Appeals for the Third Circuit dated February 8, 1996, denying Rehearing has not been reported. It is reproduced in Appendix "B" hereto.

The Memorandum and Order of the United States District Court for the Middle District of Pennsylvania dated March 21, 1995 has not been reported. It is reproduced in Appendix "C" hereto.

The Order of the District Court dated April 10, 1995, denying Petitioners' Motion for Reconsideration has not been reported. It is reproduced in Appendix "D" hereto.

The Agency decision letter of September 4,

1992 has not been reported. It is reproduced in Appendix "E" hereto.

The agency decision letter of November 30, 1992 has not been reported. It is reproduced in Appendix "F" hereto

STATEMENT OF BASIS OF JURISDICTION

The Judgement of the Court of Appeals for the Third Circuit was entered on December 20, 1995. On February 8, 1995 said Court of Appeals entered an Order denying rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISION INVOLVED

5 U.S.C. §5341(1)

It is the policy of Congress that rates of pay of prevailing rate employee be fixed and adjusted from time to time as nearly as consistent with the public interest in accordance with prevailing rates and be based on the principles that --

(1) There will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies within

the same local wage area;

5 U.S.C. §5342(a)(2)(A)

(a) For the purpose of this subchapter [5 U.S.C. §5341 et. seq.] --

(2) "prevailing rate employee" means--

(A) An individual employed in or under an agency in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semi-skilled, or skilled manual labor occupation,and any other individual, including a foreman or a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement;

4 C.F.R. §§31.1-31.4

PART 31 - CLAIMS AGAINST THE UNITED STATES; GENERAL PROCEDURE

§31.1 Scope of part.

This part prescribes general procedures applicable to claims against the United States which must be adjudicated in the General Accounting Office or in the agency out of whose activities the claim arose before payment is made or denied exclusive of transportation claims. Special procedures applicable to specified types or classes of claims against the United States are contained in the subsequent parts of this subchapter.

FILING REQUIREMENTS FOR CLAIMANTS

§31.2 Form of claim.

Unless otherwise specifically provided,

claims will be considered only when presented in writing over the signature and address of the claimant or over the signature of the claimant's authorized agent or attorney. Generally, no particular form is required for filing a claim; however, claim forms are prescribed in succeeding parts of this subchapter for specific class of claims.

§31.3 Claim filed by attorney or agent.

A claim filed by an agent or attorney must be supported by a duly executed power of attorney or other documentary evidence of the agent's or attorney's right to act for the claimant. See part II of this chapter.

§31.4 Where claims should be filed, appeals

A claimant shall file his or her claim with the administrative department or agency out of whose activities the claim arose. The agency shall initially adjudicate the claim. If the claimant is not satisfied with the agency's determination, he may appeal the determination to the Claims Group, General Accounting Office. Claims which cannot be resolved by the department or agency shall be transmitted to the Claims Group, General Accounting Office, for resolution. Claims referred by agencies or by claimants to the General Accounting Office, or any correspondence regarding a claim, should be addressed to: Claims Group, U.S. General Accounting Office, Washington, DC 20548

STATEMENT OF THE CASE

Petitioners James Klinger and Barbara J. McClain are federal employees who are employed in a supervisory capacity at the New Cumberland Army Depot, which is located near Harrisburg, Pennsylvania. They filed this class action in the District Court on behalf of themselves and all others similarly situated.

At all times material hereto, the Petitioners and class members have been employed at the New Cumberland Army Depot as "prevailing rate employees" as defined by 5 U.S.C.§5342(a)(2)(A). The definition of "prevailing rate employee," as set forth in 5 U.S.C.§5342(a)(2)(A), includes "supervisors."

It is the policy of the United States of America, as expressed in 5 U.S.C.§5341(1), that rates of pay of prevailing rate employees should be based on the principal that "there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies

within the same local wage area."

Pursuant to the Prevailing Rate Systems Act, 5 U.S.C. §5341 et. seq., the Office of Personnel Management has adopted a regulation that provides for the payment of environmental differential pay to all prevailing rate employees (including supervisors) who "work [ ] in an area where airborne concentrations of asbestos fibers may expose employees to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury." See 5 C.F.R. §532.501 et. seq.

At all times material hereto, all prevailing rate employees employed at New Cumberland Army Depot (except supervisors) were covered by a collective bargaining agreement which provided for payment of environmental differential pay.

On or about October 5, 1989, the union that represented the prevailing rate employees employed at the New Cumberland Army Depot filed a grievance under the collective bargaining agree-

ment to determine the eligibility of bargaining unit employees for environmental differential pay due to their alleged exposure to asbestos. Appellants and class members are the supervisors of those bargaining unit employees.

After a hearing conducted pursuant to procedures established by the collective bargaining agreement, an Arbitrator ruled that bargaining unit employees were eligible for environmental differential pay due to their found exposure to asbestos.

In relevant part, the Arbitrator found that:

"* * * *

> 3. Extensive evidence of asbestos detection, including but appropriately not limited to air sampling, reveal that employees in various locations have been exposed to a significant risk of asbestos-related disease." (emphasis added)

Petitioners and class members have worked in the same areas of New Cumberland Army Depot under the same conditions as members of said bargaining unit.

The Agency filed exception to the Award of Arbitrator with the Federal Labor Relations Authority. On April 11, 1991, the Federal Labor Relations Authority issued a decision upholding the Award of the Arbitrator.

On or about August 28, 1992, the Union and the Agency entered into a written Settlement Agreement wherein the Agency agreed to pay environmental differential pay to each bargaining unit employee for the time that they were exposed to asbestos.

Although the Settlement Agreement applies only to members of the bargaining unit, Petitioners and class members believe they, too, should received environmental differential pay for the following reasons:

a) The Petitioners and class members, like members of the bargaining unit, all worked in areas of the New Cumberland Army Depot where airborne concentrations of asbestos fibers exposed them to potential illness or injury and protective devices and safety measures did not

practically eliminate the potential for such personal illness or injury;

b) The Petitioners and class members, like the members of the bargaining unit, are "prevailing rate employees", and, thus, are eligible under 5 U.S.C. §5341 et. seq. and 5 C.F.R. §532.501 et. seq. for receipt of environmental differential pay due to their exposure to asbestos;

c) It is the policy of the United States that all prevailing rate employees who work under similar conditions of employment (e.g. exposure to asbestos) should receive equal pay (i.e. environmental differential pay); and

d) The Award of the Arbitrator (which was upheld by the Federal Labor Relations Authority) should collaterally estop the United States of America, Department of the Army and the Defense Logistics Agency from asserting that Petitioners and class members did not work in an area of New Cumberland Army Depot where airborne concentrations of asbestos fibers exposed them to poten-

tial illness or injury and/or that protective devices or safety measures did practically eliminate the potential for such personal illness or injury.[1]

Suits to collect back pay, including environmental differential pay, are specifically authorized against the United States and its governmental entities under 5 U.S.C. §5596; however, first the person bringing the suit must exhaust their administrative remedies.

Prior to commencing this action in the District Court both Petitioners James Klinger and Barbara J. McClain made written claims to their employing agency to recover such environmental differential pay. Those claims were denied by the Agency.

The District Court dismissed Petitioners' federal Complaint finding that they failed to exhaust their administrative remedies because

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[1] These reasons are set forth in Paragraph 22 of Petitioners' federal Complaint, which can be found in the Appendix filed in the Court of Appeals at pp. 5a-6a.

their back pay claims for environmental differential pay submitted to the agency failed to plead the legal theory on which they relied for payment in the District Court.

> "In the present case, Plaintiffs notified the DLA that they wish to receive back pay pursuant to the FLRA decision and subsequent settlement agreement in the Local 2004 asbestos case. The agency rejected the request expressly on the ground that Plaintiffs are not covered by the collective bargaining agreement which was the basis of the FLRA decision and resulting settlement. Plaintiffs never submitted a complaint to the agency pursuant to United States government policy set forth at 5 U.S.C. §5341, providing for equal pay for equal work under similar conditions." (emphasis added) (See District Court Opinion at Appendix herein, D-4)

Petitioners did not have the benefit of legal counsel at the time when they submitted their back pay claims to their Agency.

The basis of federal jurisdiction in the District Court was the Little Tucker Act, 28 U.S.C. §1346(a)(2).

REASON FOR GRANTING THE WRIT

In McCarthy v. Madigan, 510 U.S. 140, 12 S.Ct. 1081, 117 L.Ed. 2d 291 (1992) this Court decided the important question of when must administrative remedies be exhausted. This Petition presents the equally important issue of what constitutes exhaustion of administrative remedies. Has an administrative claim for back pay been exhausted if the written claim submitted to the Agency fails to plead the legal theory on which the claimant relied for payment in the District Court?

The Court of Appeals found that:

> "GAO regulations set forth the procedures for filing claims against the United States in the instant case. 5 U.S.C.§31.4[2] provides in pertinent part:
>
> **§31.4 where claims should be filed, appeals**
>
> A claimant shall file his or her claim with the administrative department or agency out of whose activities the claim

---

[2] The Court of Appeals mistakenly referred to 5 U.S.C. §31.4 when it obviously meant to cite 4 C.F.R. §31.4.

> arose. The agency shall initially adjudicate the claim. If the claimant is not satisfied with the agency's determination, he may appeal the determination to the Claims Group, General Accounting Office."

The Court of Appeals overlooked the GAO regulation at 4 C.F.R. §31.2, which states:

> "Unless otherwise specifically provided, claims will be considered only when presented in writing over the signature and address of the claimant or over the signature of the claimant's authorized agent or attorney. Generally, no particular form is required for filing a claim; however, claim forms are prescribed in succeeding parts of this subchapter for specific classes of claims." (emphasis added)

The GAO's regulation (4 C.F.R. §31.2) places no requirement on a claimant to state the legal theory of his or her claim. We believe the GAO's failure to require no more than making a "claim" in writing was intentional. Many claims against the United States are made by lay individuals, who are not versed in the law.

In an appeal involving a claim for veterans' benefits the United States Court of

Veterans Appeals said:

> "There is no requirement in the law that a veteran must specify with precision the statutory provisions or corresponding regulations under which he is seeking benefits. * * * To require that veterans enumerate which sections they found applicable to their request for benefits would change the atmosphere in which claims are adjudicated. Veterans would be required to develop expertise in law and regulations on veterans' benefits before receiving any compensation. Such a fundamental change would have to be instituted by the Legislature; it would be beyond the charter of the Department or this Court to accomplish unilaterally." Akles v. Derwinski, 1 Vet. App. 118, 121 (1991)

Although administrative claims by employees for back pay and claims by veterans for benefits are governed by different statutes, the common feature of these administrative clams is that they are usually made by lay individuals without the aid of counsel.

In Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 2d 652 (1972) this Court held that allegations of a pro se complaint are to be held to a less strict standard than formal pleadings drafted by lawyers. Such pro se complaints

should not be dismissed unless it appears beyond a doubt that the complainant can prove no set of facts in support of his claim which would entitled him to relief. Haines, 404 U.S. at 520, 91 S.Ct. at 596 This principle has been applied by several Courts of Appeals to administrative proceedings. Haithcock v. Frank, 958 F. 2d 671, 675 (6th Cir. 1992); Brock v. Dow Chemical U.S.A., 801 F. 2d 926, 930 (7th Cir. 1986)

Furthermore, the decision of the Third Circuit that Petitioners Klinger and McClain are required to plead in their administrative claims the legal theory of their claim is contrary to decisions rendered by Courts of Appeals of other circuits on this same subject.

The purpose of requiring a claimant to file a claim is to provide the Government with sufficient facts so that it can investigate its potential liability and decide whether to settle the matter. Santiago-Ramirez v. Secretary of the Department of Defense, 984 F. 2d 16, 19-20 (1st Cir. 1993); Johnson By Johnson v. United States,

788 F. 2d 845, 848-849 (2nd Cir. 1986); Bush v. United States, 703 F. 2d 491, 494 (11th Cir. 1983); Rise v. United States, 630 F. 2d 1068, 1071 (5th Cir. 1980); Rooney v. United States, 634 F. 2d 1238, 1242 (9th Cir. 1980)

Claimant is not required to set forth his legal theory of recovery in his administrative claim. Rooney v. United States, 634 F. 2d at 1242; Bush v. United States, 703 F. 2d at 494 If a claimant does set forth a legal theory of recovery in his claim this is mere surplusage. Rooney, 634 F. 2d at 1242

The District Court should consider in the federal complaint all legal theories that would be revealed as a result of the agency's conducting a reasonable investigation of the claim. Johnson By Johnson v. United States, 788 F. 2d at 849; Bush v. United States, 703 F. 2d at 494; Rise v. United States, 630 F. 2d at 1071

The fact that the agency misinterpreted Petitioners' theory of recovery should not prejudice Petitioners' suit in the District

Court. Santiago-Ramirez v. Secretary of the Department of Defense, 984 F. 2d at 20

Here, as a result of defending against the Union grievance, the agency was informed as to the extent to which Petitioners' subordinates were subjected to the hazards of asbestos. Petitioners' administrative claims are based on the fact that Petitioners were exposed to the same working environment as were their subordinates. (See Appendix filed in the Court of Appeals at pp. 52a, 58a)

Thus, the Agency did have sufficient information to investigate Petitioners' administrative claims. Had the Agency conducted such an investigation, it would have revealed that Petitioners' claim might be paid under the policy set forth at 5 U.S.C. §5341 providing for equal pay for equal work under similar conditions.

CONCLUSION

For the above stated reasons a Writ of Certiorari should issue.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-7251

JAMES KLINGER and BARBARA J. McCLAIN, on behalf of themselves and all others similarly situated,
Appellants

v.

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE ARMY, and THE DEFENSE LOGISTICS AGENCY,
Appellees

Appeal from the United States District Court for the Middle District of Pennsylvania
D.C. No. 1:CV-94-1745
District Judge: Honorable Sylvia H. Rambo

Submitted Under Third Circuit LAR 34.1(a)
December 8, 1995

Before: STAPLETON, SAROKIN, and ROSENN,
Circuit Judges

MEMORANDUM OPINION

ROSENN, Circuit Judge.

Appellants James Klinger and Barbara J. McClain brought a class action suit against the United States, the Department of the Army, and the Defense Logistics Agency to recover environmental differential pay for themselves and all others similarly situated. The district court granted the defendants' motion to dismiss, concluding that Klinger and McClain failed to exhaust their administrative remedies. Klinger and McClain timely appealed. The district court exercised jurisdiction pursuant to the Little Tucker Act, 28 U.S.C. §1346(a)(2), and we have jurisdiction to hear this appeal pursuant to 28 U.S.C. §1291. We affirm.

I.

At all times relevant to this appeal, the Appellants have held supervisory positions at the New Cumberland Army Depot ("NCAD"). In October 1989, the American Federation of Government Employees, Local 2004 ("Union") filed a grievance against the Department of the Army

("DOA") and the Defense Logistics Agency ("DLA") pursuant to their collective bargaining agreement. The grievance alleged that the bargaining unit employees at the NCAD were eligible for environmental differential pay due to their alleged exposure to asbestos.

Following a hearing, an arbitrator ruled that the NCAD violated the collective bargaining agreement with respect to the presence of asbestos. Thus, the arbitrator found that the bargaining unit employees were entitled to environmental differential pay. (FMCS Case No. 90-03744). The Federal Labor Relations Authority ("FLRA") upheld the arbitrator's decision. See 40 FLRA No. 19 (April 11, 1991). On August 28, 1992, the Union entered into a settlement agreement with the DOA and the DLA. The agreement provided that each bargaining unit employee be paid an environmental differential sum according to the duration of the individual employee's

asbestos exposure.[1]

As supervisors, the Appellants are not members of the collective bargaining unit, and were thus excluded from the award settlement agreement. They work, however, in the same areas of the NCAD and under the same conditions as the bargaining unit employees. Klinger and McClain sent several letters to the DLA requesting environmental differential pay on the same basis paid to the bargaining unit employees. Each letter referenced to the award settlement agreeement. The Agency denied their requests, explaining that the agreement did not cover supervisory employees. On October 29, 1992, the head of DLA issued a memorandum addressing the unavailability of asbestos pay for supervisors. The memorandum stated that the asbestos award settlement was based on an arbitrator's inter-

---

1 The agency agreed to pay each bargaining unit employee $42.73 for each pay period during a certain period of time that the employee was exposed to asbestos. The maximum amount that each employee could receive under the agreement was $5,085.00.

pretation of the collective bargaining agreement, and only members of the collective bargaining unit were eligible for the award.[2]

On October 26, 1994, Appellants filed suit in the United State District Court for the Middle District of Pennsylvania requesting environmental differential pay. They predicated their claim on 5 U.S.C. §5341, which provides, in pertinent part:

> **§5341. Policy**
>
> It is the policy of Congress that rates of pay of prevailing rate employees be fixed and adjusted from time to time ...in accordance with prevailing rates and be based on principles that--
>
> (1) there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all

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[2] The memorandum also addressed employee concerns regarding payment as a matter of "equity." The Appellants assert that this language evidences the DLA's knowledge of the supervisors' claims for asbestos pay pursuant to 5 U.S.C. §5341. It appears from the context of the memorandum, however, that it addressed only the requests for environmental pay arising under the settlement agreement.

agencies within the same local wage area; 5 U.S.C. 5341 (1)[3]

Pursuant to Section 5341, the Office of Personal Management ("OPM") promulgated regulations (April 1981) governing the availability of environmental differential pay for prevailing rate employees. See 5 C.F.R. §532.511 (an employee shall be paid an environmental differential when exposed to a working condition or hazard that falls within an approved category). The Appellants assert that, as supervisors, they were subject to the same air quality and working environment as the bargaining unit employees. Thus, they claim that they should receive environmental differential pay for exposure to asbestos pursuant to Section 5341 even though they are not members of the bargaining unit.

The district court found that the Appellants' requests for environmental differential

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[3] The parties agree that Klinger and McClain are covered by the "policy." The definition of "prevailing rate employee" includes supervisors. See 5 U.S.C. §5342(a)(2)(A)

pay to the DLA were all predicated on the bargaining unit settlement agreement, and that the agency made its determination solely on the reach of that agreement. The court in effect asserted that the Appellants must request environmental differential pay of the Agency pursuant to Section 5341 based on the performance of their services wholly independent of the settlement award. This would give the DLA an opportunity "to perform function is within its special competency which might moot the present controversy." Thus, the court held that Klinger and McClain failed to exhaust their administrative remedies as to their Section 5341 claim.

II.

Our review of the district court's granting of a motion to dismiss is plenary. Moore v. Tartler, 986 F.2d 682, 685 (3rd Cir. 1993). We must view the pleadings in a light most favorable to the Appellants. D.R. by L.R. v. Middle Bucks Area Vo. Tech. School, 972 F.2d 1364, 1367

(3rd Cir. 1992).

It is well settled that before a party is entitled to judicial relief against a federal agency, the party must exhaust all administrative remedies. Myers v. Bethlehem Corp., 303 U.S. 41, 50-51 (1937); Parisi v. Davidson, 405 U.S. 34, 37 1971). The purpose of the exhaustion doctrine is "to allow an administrative agency to perform functions within its special competence--to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parisi, 405 U.S. at 37.

GAO regulations set forth the procedures for filing claims against the United States in the instant case. 5 U.S.C. §31.4 provides, in pertinent part:

> **§31.4 Where claims should be filed, appeals.**
>
> A claimant shall file his or her claim with the administrative department or agency out of whose activities the claim arose. The agency shall initially adjudicate the claim. If the claimant is

> not satisfied with the agency's determination, he may appeal the determination to the Claims Group, General Accounting Office.
>
> 4 C.F.R. §31.4.

The Appellants contend that they followed the above procedures. They assert that their several letters to the DLA, were sufficient to put the agency on notice of their request for environmental differential pay pursuant to Section 5341. All of the Appellants' correspondence, however, referred to the settlement agreement. For example, Klinger's letter to the DLA of September 18, 1991 stated:

> It is my understanding a recent decision has been made by Federal Labor Relations Authority, which awards environmental differential pay, retroactively, to 7 April 88, including interest as payment.

His August 24, 1992 letter to the DLA stated:

> I believe I am entitled to environmental pay due to Federal Labor Relations Authority (40 FLRA No. 19), <u>which awarded environmental differential pay</u> to wage grade, general work force, retroactively to 7 April 88, which included interest as payment.
>
> The wage supervisors were exposed to asbestos, like the wage grade general force

> was, and I feel I am entitled to environmental differential pay as cited in the agency's settlement agreement. (Emphasis added)

Similarly, McClain's correspondence with the DLA referred to the settlement agreement.

The agency responded that the settlement agreement's application is limited to members of the bargaining unit, thus, supervisors are excluded from the award. The appellants forwarded the DLA response to the GAO. The GAO responded that it has no jurisdiction over claims concerning matters which are subject to negotiated grievance procedures under collective bargaining agreements. See Cecil E. Riggs, et al., 71 Comp. Gen. 374 (1992).

In sum, Appellants' requests to the DLA were entirely based on the settlement agreement. Further, the Agency rejected the requests expressly on the ground that the Appellants, as supervisors are not covered by the settlement agreement. The GAO's rejection of the Appellants' claim relied on the interpretation of the

settlement agreement as well.

The Appellants have not presented their claims independently of the arbitrator bargaining unit award and settlement agreement. They have not made an independent record demonstrating their independent right to differential pay. They have not given their Agency an opportunity to consider their claim for environmental differential pay pursuant to Section 5341. Therefore, we perceive no error in the district court's order to dismiss appellant's claim for failure to exhaust administrative remedies.

III.

Appellants' alternative argument is that it would be futile for them to exhaust administrative remedies in this case. They assert that the district court should have exercised its discretion to waive the exhaustion requirement. The Appellants request that we remand the case to the district court to determine whether it would

be futile in this case for the Appellants to exhaust their administrative remedies.

It is true that courts, in their discretion, have waived the exhaustion requirement. See Anderson v. Hodel, 899 F.2d 766, 769 (9th Cir. 1990; Lyons v. U.S. Marshals, 840 F.2d 202, 205 (1988). We believe, however, that the district court resolved the issue of futility. The court noted:

> The Court does not believe that the agency's determination with respect to the reach of the FLRA decision and settlement in the Local 2004 case can reasonably be read to preclude a favorable agency decision as to the Section 5341 claim. Put otherwise, the DLA has not been allowed to perform functions within its special competency which might moot the present controversy.

We conclude that the district court properly declined to exercise its discretionary power to waive the exhaustion requirement.

IV.

The Appellants never requested that the DLA consider their claim for environmental diferen-

tial pay pursuant to Section 5341. The Appellants have only requested environmental differential pay within the context of the settlement agreement. They have not presented any evidentiary record of their own mandating that their entitlement to an environmental differential pay. Thus, the Appellants must give the DLA the opportunity to consider the Appellants' claim for pay pursuant to Section 5341. Thus, we agree with the district court that it would not be necessarily futile for the Appellants to present their administrative claim on an adequate record of their own. Accordingly, the order of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

MAX ROSENN
Circuit Judge

Dec 20 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-7251

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE ARMY, and THE DEFENSE LOGISTICS AGENCY,
Appellees,

v.

JAMES KLINGER and BARBARA J. McCLAIN, on behalf of themselves and all others similarly situated,
Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. No. 1:CV-94-1745
District Judge: Honorable Sylvia H. Rambo

Submitted Under Third Circuit LAR 34.1(a)
December 8, 1995

Before: STAPLETON, SAROKIN, and ROSENN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for

the Middle District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on December 8, 1995.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the district court filed April 10, 1995, be and the same is hereby affirmed.

Attest:

P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: Dec 20 1995

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-7251

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE ARMY, and THE DEFENSE LOGISTICS AGENCY,
Appellees

v.

JAMES KLINGER and BARBARA J. McCLAIN, on behalf of themselves and all others similarly situated,
Appellants

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPELTON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN and ROSENN
Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who con-

curred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Walter K. Stapleton
Circuit Judge

Dated: FEB 08 1996

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES KLINGER and BARBARA J. McCLAIN, on behalf of themselves and all others similarly situated, Plaintiffs	:	CIVIL ACTION NO. 1:CV-94-1745
v.	:	
UNITED STATES OF AMERICA, THE DEPARTMENT OF THE ARMY, and the DEFENSE LOGISTICS AGENCY, Defendants	:	

MEMORANDUM AND ORDER

Presently before the court is Defendants' motion to dismiss. Briefs have been filed on both sides and the motion is ripe for disposition.

Background

In October 1989, the American Federation of Government Employees, Local 2004, filed a grievance with the Department of the Army ("DOA")

and the Defense Logistics Agency ("DLA") pursuant to their collective bargaining agreement. The grievance was based on a claim that Local 2004 members employed at the New Cumberland Army Depot ("NCAD") were entitled to environmental differential pay due to exposure to asbestos. A hearing was conducted according to procedures established by the collective bargaining agreement, and the arbitrator awarded differential pay on the basis of asbestos exposure. The arbitrator's award was upheld on appeal by the Federal Labor Relations Authority ("FLRA"). In August 1992, Local 2004 entered into a settlement agreement with the DOA and DLA under which each bargaining unit employee was paid according to the duration of their exposure to asbestos.

Plaintiffs Klinger and McClain are employed at NCAD as supervisors of Local 2004 bargaining unit employees. They sent several letters to the DLA and the General Accounting Office requesting differential pay pursuant to the FLRA decision

and subsequent settlement agreement in the Local 2004 asbestos case. (See Defendants' affidavits and accompanying exhibits.) They each received responses indicating that the decision and ensuing settlement were based upon provisions of the collective bargaining agreement between Local 2004 and NCAD, which does not cover supervisors such as Defendants. Id. On October 29, 1992, the head of the DLA issued a memorandum reiterating this position. (McClain affidavit, exhibit B.)

Plaintiffs filed the instant action on October 26, 1994, seeking environmental differential pay on the basis of asbestos exposure. They now concede that they are not reached by the settlement agreement in the Local 2004 asbestos case. (Complaint at ¶22.) Instead, their present back pay claim is now based upon 5 U.S.C. §5341, which sets forth the United States government policy of equal pay for substantially equal work under similar conditions of employment. Defendants have moved

to dismiss the claim in its entirety on the ground that Plaintiffs have not exhausted available administrative remedies.

Discussion

I. Motion to Dismiss Standards

Under Rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court must " 'take all well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff,' and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3rd Cir. 1988) (quoting Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3rd Cir. 1985)), cert. denied, 489 U.S. 1065 (1989). "Because 12(b)(6) results in

a determination on the merits at an early stage of the case, the plaintiff is afforded the safeguard of having all its allegations taken as true and all inferences favorable to plaintiff will be drawn." Mortenson v. First Fed. Savings and Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977).

II. Exhaustion

Judicial relief against an agency will not be granted until available administrative remedies have been exhausted. Meyers v. Bethlehem Corp., 303 U.S. 41, 50-51 (1937). "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence--to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." Parisi v. Davidson, 405 U.S. 34, 37 (1971). The doctrine of exhaustion applies to civilian backpay cases. Bur v. United States, 621 F.2d 415, 417 (Ct. Cl. 1980).

In the present case, Plaintiffs notified the DLA that they wish to receive back pay pursuant to the FLRA decision and subsequent settlement agreement in the Local 2004 asbestos case. The agency rejected the request expressly on the ground that Plaintiffs are not covered by the collective bargaining agreement which was the basis of the FLRA decision and resulting settlement. Plaintiffs never submitted a complaint to the agency claiming that they are entitled to environmental backpay pursuant to the United States government policy, set forth at 5 U.S.C. §5341, providing for equal pay for equal work under similar conditions. The court does not believe that the agency's determination with respect to the reach of the FLRA decision and settlement in the Local 2004 case can reasonably be read to preclude a favorable agency decision as to the §5341 claim.[1] Put

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[1] The court expresses no opinion concerning how the agency would respond to the §5341 claim.

otherwise, the DLA has not been allowed to perform functions within its special competency which might moot the present controversy. Consequently, the court concludes that Plaintiffs have failed to exhaust administrative remedies.

Accordingly, IT IS HEREBY ORDERED THAT:

1) Defendants' motion to dismiss is granted.

2) The Clerk of Court shall close the file.

/s/Sylvia H. Rambo
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: March 21, 1995

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES KLINGER and BARBARA J. McCLAIN, on behalf of themselves and all others similarly situated, Plaintiffs	:	CIVIL ACTION NO. 1:CV-94-1745
v.	:	
UNITED STATES OF AMERICA, THE DEPARTMENT OF THE ARMY, and the DEFENSE LOGISTICS AGENCY, Defendants	:	

ORDER

Before the court is Plaintiffs' motion for reconsideration of the court's order dated March 21, 1995, which granted Defendants' motion to dismiss on the ground that Plaintiffs failed to exhaust administrative remedies. Plaintiffs' motion raises no issues which were not before the court when the motion was decided. Accordingly, IT IS HEREBY ORDERED THAT Plaintiffs motion is denied.

/s/ Sylvia H. Rambo
SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: April 10, 1995.

APPENDIX "E"

DEFENSE LOGISTICS AGENCY
DEFENSE DISTRIBUTION REGION EAST
NEW CUMBERLAND, PA 17070-5001

In Reply
Refer To
DDRE-G 4 September 1992

SUBJECT: Environmental Differential Pay Related to Arbitrator's Award, FLRA Decision 40 FLRA No. 19, and Settlement Agreement of 26 and 28 August 1992

Mr. James L. Klinger
965 Lenker Drive
Millersburg, PA 17061

Dear Mr. Klinger:

This is in response to your letter to the Office of Counsel dated 24 August 1992 in which you request to share in the settlement of subject Award.

The Award in this case was based upon the Arbitrator's interpretation of the labor agreement negotiated between New Cumberland Army Depot management and the leadership of AFGE Local 2004. That agreement is limited in its application to members of the bargaining unit. Supervisors are not members of the bargaining unit. Therefore supervisors are not included in the Award. Also general schedule employees are not included in the Award because the law does not provide environmental differential pay for general schedule employees.

Let me reemphasize that the Award was based upon the Arbitrator's interpretation of the labor

agreement. The Arbitrator did not find the air quality in the workplace to be less than what is called for by the standards of the Occupational Safety and Health Agency (OSHA). In fact, he specifically found that something more was required because of the language in the labor agreement. However, the labor agreement did not spell out a standard and the arbitrator did not define or provide a standard for the 'something more'. He left it to the parties to resolve by themselves.

To summarize, OSHA standards did not provide a basis for environmental differential pay from April 1988 to the present. Consequently the only payment resulting from the arbitrator's Award will be to wage grade and wage leader members of the bargaining unit under the terms of the August 1992 settlement agreement.

Sincerely,

/s/ James E. Toms
James E. Toms
Counsel

APPENDIX "F"

DEFENSE LOGISTICS AGENCY
DEFENSE DISTRIBUTION REGION EAST
NEW CUMBERLAND, PA 17070-5001

In Reply
Refer To
DDRE-G 30 November 1992

SUBJECT: Mr. James L. Klinger Claim for Environmental Differential Pay Related to Arbitrator's Award, FLRA Decision 40 FLRA No. 19, and Settlement Agreement of 26 and 28 August 1992

TO: GGD-Claims Group (Attn: Mary Jane Roberts) U.S. General Accounting Office Room 5450 Washington, DC 20548

1. This office is in receipt of your November 6, 1992 letter to Mr. James L. Klinger. (enclosure 1) This constitutes the requested report.

2. We have no record of having received Mr. Klinger's memorandum dated 18 September 1991 (enclosure 2) prior to its enclosure with his letter dated 24 August 1992 (enclosure 3) sometime before 4 September 1992. Our response on that date is (enclosure 4).

3. The Arbitrator's Award, the FLRA Decision and the Settlement Agreement relevant to this matter are (enclosures 5, 6, & 7).

4. The Arbitrator's Award in this case is based on his interpretation of the collective bargaining agreement between AFGF Local 2004 and New Cumberland Army Depot. The Arbitrator did not find the air quality in the workplace to be less than what is called for by the standard of the Occupational Safety and Health Administra-

tion (OSHA) Regulations. In fact, he specifically found that something more was required because of the collective bargaining agreement. However, the collective bargaining agreement did not spell out a standard and the arbitrator did not define or provide a standard for the 'something more'. He left it to the parties to resolve by themselves. Mr. Klinger is not a member of the bargaining unit represented by AFGE 2004. At no time relevant to the Arbitration was he a member of the bargaining unit.

5. To summarize, OSHA standards did not provide a basis for environmental differential pay from April 1988 to the present. Consequently the only payment resulting from the Arbitrator's Award will be to wage grade and wage leader members of the bargaining unit under terms of the August 1992 settlement agreement.

Sincerely,

/s/ James E. Toms
James E. Toms
Counsel

cf:
Mr. Klinger

[Enclosures Omitted]

Supreme Court, U.S.
FILED
AUG 2 1996
OFFICE OF THE CLERK

No. 95-1863

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES KLINGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
MARK C. NILES
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QUESTION PRESENTED

Whether the district court correctly determined that petitioners failed to exhaust their administrative remedies.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1863

JAMES KLINGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1 - A13) is unpublished, but the decision is noted at 74 F.3d 1226 (Table). The opinion of the district court (Pet. App. C1 - C7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1995. A petition for rehearing was denied on February 8, 1996. Pet. App. B1-B2. The petition for a writ of certiorari was filed on May 8, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1989, pursuant to a collective bargaining agreement, Local 2004 of the American Federation of Government Employees filed a grievance against the Department of the Army and the Defense Logistics Agency (DLA or the agency), claiming that bargaining unit employees at the New Cumberland Army Depot had been exposed to asbestos. Pet. App. A2-A3. An arbitrator awarded "environmental differential pay" to those employees, and the Federal Labor Relations Authority upheld the award. *Id.* at A3. In 1992, DLA and Local 2004 entered into a settlement agreement, which provided that each bargaining unit employee would be paid an amount, up to a maximum of $5,085 per employee, based on the duration of the employee's exposure to the asbestos. *Id.* at A3-A4 & n.1.

Petitioners, James Klinger and Barbara J. McClain, are supervisory employees at the Depot. Pet. App. A2. Although petitioners worked in the same areas of the Depot as the other employees, supervisors are not members of the Local 2004 bargaining unit, and petitioners therefore were not parties to the settlement. *Id.* at A4. Petitioners nonetheless sent several letters to the DLA requesting differential pay, each time basing those requests on the DLA's settlement agreement with the bargaining unit employees. The DLA denied these requests on the ground that the agreement did not cover petitioners. *Id.* at A9-A10.

In 1994, petitioners filed suit in federal district court. They based their claim to differential pay on 5 U.S.C. 5341, which sets forth the "policy of Congress" with regard to the "rates of pay of prevailing

rate employees." One of the principles governing such rates is that "there will be equal pay for substantially equal work for all prevailing rate employees who are working under similar conditions of employment in all agencies within the same local wage area." Pet. App. A5-A6. Petitioners argued that, because they had been subjected to the same working environment as the bargaining unit employees, Section 5341 gave them a right to the same environmental differential pay as the other employees. Pet. App. A6. It is upon this underlying claim for differential pay under Section 5341 that petitioners have based their claim for retroactive relief under the Back Pay Act, 5 U.S.C. 5596. See Pet. 11.

The district court dismissed petitioners' claim. Pet. App. C7. The court held that petitioners had failed to exhaust their administrative remedies because, in their letters to the agency, they had based their claim to differential payment, not on any rights they may have under Section 5341, but on the settlement agreement between Local 2004 and the DLA. Pet. App. C6.

The court of appeals affirmed. It held that petitioners had never presented the agency with claims independent of the settlement agreement and, in particular, that they had "not made an independent record demonstrating their independent right to differential pay." Pet. App. A11. Because petitioners had therefore "not given their Agency an opportunity to consider their claim for environmental differential pay," *ibid.*, the court of appeals upheld the district court's decision to dismiss their claim for failure to exhaust administrative remedies.

ARGUMENT

Like other statutes creating causes of action against federal agencies, the Back Pay Act and its implementing regulations require claimants to exhaust administrative remedies before seeking judicial review. 5 U.S.C. 5596(b)(1); see also 4 C.F.R. 31.4 ("A claimant should file his or her claim with the administrative department or agency out of whose activities the claim arose."); *Walker* v. *United States*, 179 Ct. Cl. 723 (1967), cert. denied, 389 U.S. 1036 (1968); see generally *Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Petitioners do not contend otherwise. Rather, they argue that they did in fact exhaust their administrative remedies. In their letters to the DLA, however, petitioners did not cite either the Back Pay Act or 5 U.S.C. 5341, the provision on which they base their substantive argument for differential pay.

Petitioners cite several cases (involving statutes other than the Back Pay Act and Section 5341) for the proposition that claimants can satisfy the exhaustion requirement by providing their agencies with the broad outline of their claims, even if they do not specifically invoke the legal provision upon which they later base their claim for judicial relief. See Pet. 16-17. Those decisions appear inconsistent with the view of the court below (see Pet. App. A11) that petitioners' failure to invoke Section 5341 in their administrative claims constituted a violation of the exhaustion requirement.

Whether or not petitioners have exhausted their administrative remedies with respect to Section 5341, however, they have no cause of action under the Back Pay Act, the only basis for relief mentioned in the

question presented in their petition (see Pet. i, 13; see also Pet. 11).[1] The Act "creates no alternative cause of action," but is instead "an auxiliary measure that operates only at the relief stage. It furnishes relief only *after* an 'appropriate authority' finds that, under some *other* provision of law, a federal employee has suffered an 'unjustified or unwarranted personnel action.'" *Brown* v. *Secretary of the Army*, 918 F.2d 214, 217 (D.C. Cir. 1990) (emphasis added) (quoting 5 U.S.C. 5596(b)(1)), cert. denied, 502 U.S. 810 (1991). Thus, a "plaintiff may not recover anything under the Back Pay Act unless and until he or she has * * * *succeeded* on the merits" of the substantive claim that assertedly creates the derivative right to back pay. 918 F.2d at 217-218 (emphasis added). Here, petitioners have never—in any forum—"succeeded on the merits" of their substantive claim to differential pay under Section 5341. They therefore have no basis for seeking relief from this Court under the Back Pay Act.

Moreover, even if an "appropriate authority" *had* issued a finding that Section 5341 grants petitioners a

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[1] It is also doubtful that petitioners have a valid claim under Section 5341, which sets forth a federal policy of "equal pay for substantially equal work." The supervisory work that petitioners perform is not in fact "substantially equal" to the work of the non-supervisory personnel covered by the settlement agreement. Moreover, although Section 5341 and related provisions may, under certain circumstances, permit employees to challenge the wage grade classification of a category of federal jobs, see generally *Barnhart* v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985); *Haneke* v. *Secretary of Health, Educ. & Welfare*, 535 F.2d 1291 (D.C. Cir. 1976), it does not create a cause of action entitling supervisory, non-bargaining-unit employees to the benefits of collective bargaining settlement agreements.

substantive right to differential pay, petitioners still would have no valid claim to back pay. Relief under the Back Pay Act is governed by 5 U.S.C. 5596(b)(1). See *Brown*, 918 F.2d at 218; see also Pet. 11. Under that provision, "a federal employee seeking to recover under the Act must be found 'to have been affected by an unjustified or unwarranted personnel action which has resulted in the *withdrawal or reduction* of all or part of [his or her compensation].'" *Brown*, 918 F.2d at 218 (emphasis partially deleted; brackets in original) (quoting 5 U.S.C. 5596(b)(1)). Here, petitioners have not, and could not have, alleged that the denial of *additional* pay to compensate for certain environmental hazards "resulted in the withdrawal or reduction" of their compensation. That fact alone is fatal to petitioners' Back Pay Act claim. See 918 F.2d at 218-221; accord *Spagnola* v. *Stockman*, 732 F.2d 908 (Fed. Cir. 1984); see also *United States* v. *Testan*, 424 U.S. 392 (1976).[2]

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[2] The *Brown* Court identified a single circumstance under which a simple "failure * * * to confer a benefit," 5 U.S.C. 5596(b)(4), could give rise to a claim under the Back Pay Act: where an agency has improperly failed to confer a "mandatory," "nondiscretionary," and "virtually automatic" benefit or payment that is "*required* by law (a statute or regulation)." *Brown* v. *Secretary of the Army*, 918 F.2d at 220 (internal quotation marks omitted). Petitioners' claim does not fall into that category.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MARLEIGH D. DOVER
MARK C. NILES
Attorneys

AUGUST 1996

Supreme Court, U.S.
FILED
AUG 13 1996
OFFICE OF THE CLERK

(3)

NO. 95-1863

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

JAMES KLINGER and BARBARA J. McCLAIN, on behalf of themselves and all others similarly situated,
Petitioners

v.

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE ARMY, and THE DEFENSE LOGISTICS AGENCY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE BASIS OF THE RELIEF SOUGHT BY PETITIONERS IS THE PREVAILING RATE SYSTEMS ACT AND REGULATIONS OF THE OFFICE OF PERSONNEL MANAGEMENT IMPLEMENTING THAT ACT

The Government concedes that the decision of the Court below is inconsistent with decisions from other circuits and it makes no effort to defend the decision of the Court below. (See Brief for the United States, p. 4) Instead, the Government argues that there is no basis for Petitioners' claims under the Back Pay Act. (Brief for the United States, p. 5)

The Government misconstrues the basis of Petitioners' pay claims for environmental differential pay. The Petition for Writ of Certiorari states:

> "The Petitioners and class members, like members of the bargaining unit, are 'prevailing rate employees' and, thus, are eligible under 5 U.S.C. §5341 et seq. and 5 C.F.R. §532.501 et seq. for receipt of environmental differential pay due to their exposure to asbestos." (Pet. 10)

The Prevailing Rate Systems Act, 5 U.S.C.

§5341 et seq. provides in relevant part:

> "The Office of Personnel Management, by regulation, shall prescribe practices and procedures for conducting wage surveys, analyzing wage survey data, developing and establishing wage schedules and rates, and administering the prevailing rate system. The regulations shall provide -
>
> * * * *
>
> 4) for proper differentials, as determined by the Office, for duty involving unusually severe working conditions or usually severe hazards."

5 U.S.C. §5343(c)(4)

The pertinent regulations issued by the Office of Personnel Management state in part:

> "In accordance with section 5343(c)(4) of Title 5, United States Code, an employee shall be paid an environmental differential when exposed to a working condition or hazard that falls within one of the categories approved by the Office of Personnel Management." (emphasis added) 5 C.F.R. §532.511(a)(1)

The Office of Personnel Management has approved sixteen (16) categories for such payment. One of those categories is asbestos and states:

> "16. Asbestos. Working in an area where airborne concentrations of asbestos may expose employees to potential illness or injury and protective devices or safety measures have not practically eliminated the potential for such personal illness or injury."

Appendix "A" to 5 C.F.R. §532.501 et. seq.

In Bendure v. United States, 554 F. 2d 427, 431, 213 Ct. Cl. 633 (1977) the Court held that:

> "EDP [i.e. environmental differential pay] is a specific statutory right granted to Government employees; it grants them extra pay in those situations where the tasks of their work subjects them to inescapable environmental risk. 5 U.S.C. §5343(c) * * * *" (emphasis added)

The Court further held that:

> " . . . [I]f plaintiff can establish in a court trial that their duties involve such working conditions, the statute requires that they receive the extra pay." (emphasis added) Bendure, 557 F. 2d at 435

What the Government fails to comprehend is that just because Petitioners are not members of the bargaining unit, does not mean that they are not entitled to environmental differential pay

if they, too, were exposed to asbestos.

In Harris v. United States, 841 F. 2d 1097, 1101 (Fed. Cir. 1988) the United States Court of Appeals for the Federal Circuit held that where prevailing rate employees are members of a collective bargaining unit, they must pursue their rights to environmental differential pay under the remedies of the collective bargaining agreement (as was done by Petitioner's subordinates). However, where prevailing rate employees are not members of a collective bargaining unit, the District Court has jurisdiction of their claims for environmental differential pay.

Thus, because the Petitioners here are "prevailing rate" employees, who are not members of a collective bargaining unit, the District Court below had jurisdiction over Petitioners' claims for environmental differential pay.

CONCLUSION

For the aforegoing reasons, the Petition for Writ of Certiorari to the Court of appeals for the Third Circuit should be granted.

Respectfully submitted,

Ralph B. Pinskey, Esquire
Attorneys for Petitioners
James Klinger and Barbara
J. McClain